In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1368

THE NATIONAL CASH REGISTER COMPANY,
Petitioner,

vs.

NCR EMPLOYEES' INDEPENDENT UNION, ET AL.,
Respondents.

REPLY BRIEF OF PETITIONER, THE NATIONAL CASH REGISTER COMPANY

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REPLY BRIEF OF PETITIONER, THE NATIONAL CASH REGISTER COMPANY

1. "The Law of the Case" Doctrine Is Inapplicable.

In Section 1 of their brief, the Respondents contend that this Court cannot review the judgment entered by the Court of Appeals for the Sixth Circuit on December 18, 1973, because the earlier decision of the Sixth Circuit entered on April 10, 1972, was not the subject of a motion for rehearing or an attempted appeal at that time by the Petitioner. (Resp. Brief, pp. 4-5) There is no validity to this contention.

In its decision of April 10, 1972, the Court of Appeals did not order arbitration. (Sup. App. SA-1) The Court held that the court below should not have decided the issue

under Rule 12(b) without a hearing, and without prior notice that the motion to dismiss would be treated as a motion for summary judgment and the case disposed of in that manner. The Court of Appeals said:

> "We conclude that in the state of the present record the only equitable and reasonable alternative open to us is to vacate the judgment of the district court and remand the action for further proceedings. On remand, if the court intends to treat the motion to dismiss as a motion for summary judgment, notice should be given to this effect and a reasonable opportunity afforded to present any additional evidence bearing upon the issue of arbitration.
>
> "In the event the court proceeds in this manner and again concludes that arbitration is the exclusive remedy on the merits of plaintiffs' claim of violation of the 'Work Schedule,' we think that in the interest of justice and equity the court should direct the parties to proceed to arbitration on the violation issue rather than dismiss the action outright.[1] It follows that if the court should conclude that the plaintiffs' claim is not governed by any arbitration clause, it would then proceed to determine the plaintiffs' claim on the merits."

Footnote 1 stated that:

> "The Court in this event should specify the applicable arbitration provision and its order should direct arbitration of the substantive issue without regard to any possible contractual time or other procedural limitations. To enforce its order the Court will retain jurisdiction pending arbitration."

It is obvious that the above ruling was not an order to arbitrate, because the Court of Appeals specifically

instructed the District Court that if, after it received evidence, it concluded that the claim was not governed by any arbitration clause "it would then proceed to determine the plaintiffs' claim on the merits."

The order to arbitrate did not come until January 16, 1973, when the District Court concluded that arbitration was respondents' "exclusive remedy" and directed the parties to proceed to arbitration. (App. C) The respondents made a timely appeal of that decision to the Court of Appeals. That Court considered the appeal on its merits, giving consideration to evidence adduced at the hearing below by the respondents that:

> "This lawsuit was brought in an atmosphere of confusion as to whether the temporary work schedule was a part of the collective bargaining agreement."

It affirmed the order to arbitrate issued by the court below on January 16, 1973.

The Petitioner has made a timely application for certiorari subsequent to the entry of that judgment of the Court of Appeals. *28 U.S.C. §1254(1)* authorizes this Court to review *all* "cases in the Courts of Appeals" by "writ of certiorari granted upon the petition of any party * * * before or after rendition of judgment or decree." This is such a case and judgment and the doctrine of "law of the case" cannot bar review by this Court.

In *Mason-Dixon Lines, Inc.* v. *Local 560* (CA 3; 1971) 443 F. 2d 807, the District Court, as in the instant case, ordered arbitration and retained jurisdiction pending arbitration. It was contended that because of such retention of jurisdiction, the order was not a final order and was not appealable. The court rejected the contention and reviewed the case on its merits affirming the judgment of the District Court.

Stewart v. *Salamon* (1878) 97 U.S. 361, relied on by the Respondents (Brief, p. 5) was a case in which the Supreme Court had decided the issue on the first appeal and was then presented with a second appeal covering the same ground previously decided by the Court. In the instant case, this Court has never decided the issue presented by the instant petition for certiorari.

The Court of Appeals in its second decision of December 18, 1973 (App. A) did not regard its initial decision of April 10, 1972 (Sup. App. SA-1) as the law of the case binding on it in the second appeal because, as pointed out above, there had been no proper evidence before the trial court prior to the first appeal and the order given by the Court of Appeals in the first appeal was not a final order to arbitrate.

In *White* v. *Murtha* (CA 5; 1967) 377 F. 2d 428, relied on by the Respondents in their brief (Brief, p. 4), the case was in the posture it was in when before the same court on a previous occasion. Accordingly, the court properly regarded its previous decision as the "law of the case." In so doing, however, the court pointed out that "the 'law of the case' doctrine is not an inexorable command" and would not be applicable if "the evidence on a subsequent trial was substantially different" or "the decision was clearly erroneous and would work a manifest injustice." (At 431-32) Those also are factors which distinguish the present case.

2. The Court Below Erred in Ordering Arbitration.

The Respondents are in error when they state that the court below had "inherent equitable power" to order arbitration in the instant case "pursuant to national labor policy." (Brief, p. 5) Congress has stated:

> "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method

> for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." (29 U.S.C. §203(d))

The District Court, in its order of January 16, 1973 (App. C), specifically found that:

> "* * * the 'Work Schedule' is an integral part of the Collective Bargaining Agreement and that the plaintiffs' exclusive remedy lies under the grievance arbitration procedures of the Bargaining Agreement executed January 30, 1969."

The Respondents acknowledge that they did not appeal that ruling or that finding. (Brief, p. 6) The collective bargaining agreement, which the court below has found to provide the "exclusive remedy" herein requires the Union to request arbitration "within thirty (30) calendar days after the Union's receipt of the Company's Step 5 reply to the grievance" and then specifically provides that:

> "Any grievance not so appealed shall be considered settled on the basis of the reply given in Step 5." (Petitioner's Brief, p. 10)

Within thirty days after the Company denied the grievances in the fifth step, the Respondents advised the Petitioner that they had decided *not* to arbitrate the grievances, and subsequently, filed their class action in the Court of Common Pleas.[1] Thereupon, under the method of adjustment agreed upon by the parties, the grievances were

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1. The Respondents' statement on page 9 of their brief that they had made "unsuccessful efforts to exhaust grievance remedies" and that this "as a matter of equity" entitled them "to a decision on the merits in arbitration" is wholly untrue. Elsewhere in the brief they have admitted that they did *not* "exhaust grievance remedies". They acknowledge that "the union did not process the eight individual grievances to arbitration, and the time limits for demanding arbitration expired, during the course of this litigation." (Brief, p. 3)

"considered settled on the basis of the reply given in Step 5."

When the court ordered arbitration under such circumstances it violated the agreement of the parties. It also violated the agreement when it ordered the parties to proceed to arbitration "without regard to any contractual time or procedural limitation contained in" the agreement. The parties had agreed that:

> "Where arbitrability such as timeliness is at issue, the Arbitrator will hear the evidence and argument on that issue, and decide that issue first." (Agreement, Section 7.08.04; Pet. brief, p. 4)

We have found no other decision in which a federal court has ordered parties to arbitrate in violation of specific terms of the parties' own agreement specifying a method of "final adjustment" of grievances under the contract. The cases cited by the Respondents are easily distinguished. In *Boone* v. *Armstrong Cork Co.* (CA 5; 1967) 387 F. 2d 285 (Brief, p. 5), the plaintiff sued without filing a grievance under the contract. Unlike the instant case, the contract contained no time limit within which grievances had to be filed and there was no provision that the grievance would be considered settled if not filed within the time limit. The court directed the District Court to suspend further proceedings "until the parties have had reasonable opportunity to exhaust the contractual grievance procedure." (At 290)

Likewise, in *International Association of Heat and Frost Insulators and Asbestos Workers, Local 66* v. *Leona Lee Corp.* (CA 5; 1970) 434 F. 2d 192 (Brief, p. 5), the collective bargaining agreement provided that all disputes would be settled through reference to a trade board and ultimately by arbitration. There were no time limits for the presentation of disputes to the trade board. The grievance pro-

cedure had not been initiated because the dispute arose under a separate "settlement agreement" which had been executed during the term of the collective bargaining agreement. The court found that the "settlement agreement" was intended to be a part of the collective bargaining agreement and directed the parties to submit the dispute to the trade board under the provisions of that agreement. Unlike the instant case, this order of the court did not in any way violate or disregard provisions of the applicable collective agreement. Also, in the instant case, unlike *Leona Lee*, a grievance had been filed and had been processed through five steps of the grievance procedure before the suit was filed.

In *Mason-Dixon Lines, Inc.* v. *Local 560, supra* (Brief, p. 5), the parties had agreed that all disputes would be resolved "pursuant to the grievance procedure." The agreement contained no time limits for the initiation of grievances. As the employer sued without first resorting to the grievance procedure, the court directed that it do so, and stayed the proceeding pending exhaustion of the grievance procedure. The court did not direct the arbitrator to ignore "contractual time or procedural limitation" as in the instant case. (App. A.3, 10)

The Respondents assert that permitting the Petitioner to advance "contractual time or procedural limitation" issues would produce "a monstrous result." (Brief, p. 6) Actually, it is the decision of the court below that produces "a monstrous result." The Petitioner bargained and paid for certain protections in its collective bargaining agreement with the Respondents. One of these was that any grievance, if it is to be arbitrated, requires "written notification to that effect to the Company given within thirty (30) calendar days after the Union's receipt of the Company's Step 5 reply to the grievance." (Agreement, Sec-

tion 7.08; Pet. brief, p. 10) A second protection was that, "Any grievance not so appealed shall be considered settled on the basis of the reply given in Step 5." (Agreement, Section 7.08; Pet. brief, p. 10) The decision of the court below strips the Petitioner of these protections in consideration of which it gave wage increases and many other benefits. Before the expiration of the thirty days, the Union notified the Petitioner that it had decided not to take the case to arbitration. Petitioner has now been required to litigate a grievance which the parties had agreed was to "be considered settled on the basis of the reply given in Step 5." Collective bargaining is not a one-way street. Employers, as well as employees, acquire rights from collective bargaining agreements. *Haynes* v. *U. S. Pipe & Foundry Co.* (CA 5; 1966) 362 F. 2d 414.

3. The Doctrine of Election of Remedies Is Inapplicable.

The doctrine of election of remedies "refers to situations where an individual pursues remedies that are legally or factually inconsistent." *Harold Alexander* v. *Gardner-Denver Co.* (1974) ..... U.S. .....; 42 L.W. 4214, at 4218. The litigant has two remedies available and is bound to pursue one or the other, but not both. *In the instant case, the Petitioner never had a choice of remedies.* Under the Trilogy decisions of this Court, the grievance procedure, terminating in arbitration, by agreement of the parties was the *sole* remedy. The Respondents recognized this by filing their grievances promptly under the contract grievance procedure and carrying them through the first five steps of the procedure. Although arbitration was permitted, the Union notified the Petitioner that it had decided not to arbitrate. Subsequently, it sued. The Respondents have now admitted to this Court that the Union's "choice of remedy was in error." (Brief, p. 3)

Obviously, the filing of the suit could not excuse the Respondents' failure to make a timely request for arbitration. If there was "an atmosphere of confusion as to whether the temporary work schedule was a part of the collective bargaining agreement," as suggested by the Court of Appeals (App. A.3), the Respondents could easily have protected themselves by noticing the grievances for arbitration and concurrently filing the lawsuit. Filing the lawsuit did not prevent them from requesting arbitration.

In *Burnett* v. *New York Central R.R. Co.* (1965) 380 U.S. 424 (Brief, p. 8), it was held that timely commencement of a Federal Employer's Liability Act action in a state court tolled the statute of limitations on the filing of such a proceeding in federal court. The decision was based on "*legislative* intent." The instant case is not based on statute but on contract. The intention of the parties is crystal clear. They specifically agreed that a grievance not appealed to arbitration within thirty days "shall be considered settled on the basis of the reply given in Step 5." The decision of the court below, therefore, does not implement "intent"—it violates intent.

Culpepper v. *Reynolds Metals Co.* (CA 5; 1970) 421 F. 2d 888 (Brief, p. 8) is another case in which the court construed *legislative* intent and concluded that the legislature would have intended that the timely filing of an arbitration proceeding would toll the limitation period of a remedial civil rights statute.

4. This Case Is Appropriate for Certiorari.

Certiorari is clearly appropriate because the court below has violated decisions of this Court. The Petitioner is not asking the Court to expound "general principles of law." (Brief, p. 11) It is asking this Court to correct the decision of the Court of Appeals which is clearly erroneous and in flagrant violation of landmark decisions of this Court. In such situations, it is entirely appropriate, as in *Oscar R. Ewing* v. *Theodore F. Gardner* (1951) 341 U.S. 321, for the Court to grant certiorari and issue a per curiam opinion reversing the decision below.

Respectfully submitted,

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SUPPLEMENTARY APPENDIX

No. 71-1526

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NCR EMPLOYEES' INDEPENDENT UNION, et al.,
Plaintiffs-Appellants,

v.

NATIONAL CASH REGISTER COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Ohio, Western Division.

Decided and Filed April 10, 1972

BEFORE: PHILLIPS, Chief Judge, and CELEBREZZE and MILLER, Circuit Judges.

Per Curiam. This action was originally instituted in the Common Pleas Court of Montgomery County, Ohio, by the NCR Employees' Independent Union and three individual employees against the National Cash Register Company, seeking a declaration of the rights of production and maintenance employees to be recalled for overtime work on Saturday, December 28, 1968, and Saturday, January 4, 1969, under the terms of a "Work Schedule" agreed upon by the union and the company as part of a strike settlement. The plaintiffs also sought an award for compensation for employees who were not recalled for work on those days. Upon petition of the defendant the action was removed on federal question grounds to the United States District Court for the Southern District of Ohio. After removal, the defendant filed a motion for summary judgment, pursuant to Rule 56 of the Federal Rules of

Civil Procedure, upon the ground that "plaintiffs are attempting to enforce its Union Agreement by judicial procedure rather than utilizing its exclusive remedy by grievance and arbitration procedure under said Agreement as applied by law."

In its memorandum filed in support of the motion for summary judgment the defendant conceded that "the court has jurisdiction by virtue of Sec. 301(a) of the National Labor Relations Act, 29 U.S.C. Sec. 185(a)." The issue raised by the motion for summary judgment was whether the "Work Schedule" upon which the plaintiffs based their claim was a part of the overall collective bargaining agreement to settle a strike of the employees or whether the "Work Schedule" was a separate and distinct agreement not subject to the grievance and arbitration procedure. Following the filing of the motion for summary judgment by the defendant on March 13, 1969, an extensive record was developed in the form of affidavits, answers to interrogatories and various exhibits, regarding the dealings and negotiations between the parties leading to the strike settlement and the eventual formalizing of a collective bargaining agreement on January 30, 1969, which was made retroactive to December 17, 1968.

By an order entered on July 28, 1969, the court overruled the motion for summary judgment without stating any reasons therefor. On August 28, 1969, the defendant filed its answer. Thereafter, further evidence was developed by the parties on factual issues pertaining both to the alleged violation of the "Work Schedule" agreement and to the question of arbitrability of the issues involved. On September 14, 1970, the defendant filed its motion to dismiss the action "on the ground that this court is without jurisdiction to hear and determine the same." In its memorandum in support of its motion to dismiss the

defendant made repeated references to the evidence which had been developed and argued essentially that the basis for the motion to dismiss for lack of jurisdiction was the theory that the exclusive remedy of the plaintiffs was arbitration as allegedly provided for by the strike settlement agreement. It was argued that this conclusion followed from the "testimony" which had been introduced. Still further evidence was introduced in the form of depositions after the filing of the motion to dismiss.

The district court on January 11, 1971 entered its memorandum opinion and order finding and holding that the court was without jurisdiction to redress the alleged violation of the "Work Schedule" agreement for the reason that the exclusive remedy of the plaintiffs "lies under the grievance arbitration procedures of the applicable bargaining agreement." The court pointed out in its memorandum that the action was before it upon the defendant's motion to dismiss for lack of jurisdiction, but in making disposition of the action the court treated the motion to dismiss "as a motion for summary judgment on the question of jurisdiction." So treating the motion the court examined the evidentiary record which had been developed and concluded (a) that there are no genuine issues of material fact and (b) that as a matter of law the "Work Schedule" is part of the overall bargaining agreement so that plaintiffs' exclusive remedy lies under the arbitration procedure of the collective bargaining agreement and not by an action in federal court.

An examination of the record fails to disclose that any formal hearing was held by the court or that any notice was given to the parties that the court intended to treat the time for taking evidence as closed and to dispose of the motion to dismiss as in the nature of a motion for summary judgment.

While we are not prepared to say that the court was incorrect in concluding that there was no genuine issue of fact as to the arbitration issue on the basis of the evidence as it had been developed as of that time, we find no authorization in the Federal Rules for the court to treat a motion to dismiss as a motion for summary judgment without a hearing and without notice to the parties that the motion would be so treated and the case disposed of in that manner.

Rule 56 may be read to authorize the court to dispose of a motion for summary judgment forthwith if the "pleadings, depositions, answers to interrogatories, and admissions on file together with affidavits, if any, show that there is no genuine issue as to any material fact." However, as we read the rule, this may be done under Rule 56 only where a hearing date has been set for disposition of a motion for summary judgment filed as such. This would seem to follow from the provision that the motion shall be served at least ten days "before the time fixed for the hearing," and the further provision that the adverse party "prior to the day of hearing" may serve opposing affidavits.

Rule 12 (b) authorizes the court to treat a motion to dismiss as one for summary judgment and to dispose of the case in conformity with Rule 56, but this procedure appears to be confined to motions to dismiss "for failure of the pleadings to state a claim upon which relief can be granted." It is significant that the Rule further provides that in the event the motion to dismiss is so treated as one for summary judgment "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Rule 12(c) also provides that the court may treat a motion to dismiss on the pleadings as a motion for summary judgment if matters

outside the pleadings are presented to and not excluded by the court. Yet in this instance also the Rule provides "that all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Although, as stated, we have not found any direct authorization for the court to treat a motion to dismiss for lack of jurisdiction as a motion for summary judgment where matters outside the record have been presented and not excluded by the court, as was done in this case, we are of the opinion by analogy to the procedure provided for by Rules 12(b) and (c), that such a motion could be treated by the court as a motion for summary judgment, but only after the court gives notice to the parties that it intends to treat the motion to dismiss in that manner and allows a reasonable time for the parties to present any further evidentiary matters which may be relevant and available to them.

In this case the district court, so far as we can determine after a review of the record, treated the motion to dismiss for lack of jurisdiction as a motion for summary judgment without notice to the parties and without affording them any further opportunity to develop the factual issues. It may be that all of the pertinent evidence had been placed on record as of the time the District Court entered its memorandum opinion, but there is no way in the record for us to determine this fact and there is no way for us to know that the District Judge was in position to conclude that there was no further evidence to be presented by either party. We conclude that in the state of the present record the only equitable and reasonable alternative open to us is to vacate the judgment of the district court and remand the action for further proceedings. On remand, if the court intends to treat the motion to dismiss as a motion for summary judgment, notice should be given to this effect and a reasonable

opportunity afforded to present any additional evidence bearing upon the issue of arbitration.

In the event the court proceeds in this manner and again concludes that arbitration is the exclusive remedy on the merits of plaintiffs' claim of violation of the "Work Schedule," we think that in the interest of justice and equity the court should direct the parties to proceed to arbitration on the violation issue rather than dismiss the action outright.[1] It follows that if the court should conclude that the plaintiffs' claim is not governed by any arbitration clause, it would then proceed to determine the plaintiffs' claim on the merits.

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1. The Court in this event should specify the applicable arbitration provision and its order should direct arbitration of the substantive issue without regard to any possible contractual time or other procedural limitations. To enforce its order the Court will retain jurisdiction pending arbitration.